UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

FEB 24 2014

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Consent Agreement and Proposed Final Order
In the Matter of American Lifan Industry, Inc., CAA-HQ-2014-8034

FROM: Susan Shinkman, Director
Office of Civil Enforcement

TO: Environmental Appeals Board

Attached for your ratification and issuance is a Consent Agreement and proposed Final Order (CAFO) to settle the above-referenced enforcement action regarding violations of Title II of the Clean Air Act (CAA), 42 U.S.C. §§ 7521–7554, and the regulations at 40 C.F.R. Parts 86, 90, 1051, and 1068. The CAFO is enclosed here.

Phillip A. Brooks, Director of the Air Enforcement Division (AED) of the Office of Civil Enforcement (OCE) of the Office of Enforcement and Compliance Assurance (OECA), signed this CAFO on behalf of the United States Environmental Protection Agency (EPA). Fangshun Guo signed this CAFO on behalf of American Lifan Industry, Inc. (Respondent). The parties have agreed to settle all causes of action without litigation. Therefore, this proceeding will be simultaneously commenced and concluded if and when the Environmental Appeals Board (EAB) ratifies the Consent Agreement and issues the proposed Final Order. 40 C.F.R. §§ 22.13(b), 22.18(b)(2)–(3).

This memorandum is provided in accordance with Appendix 4 of the *Environmental Appeals Board Practice Manual* (September 2010 version), which provides that the OCE Director or Acting Director transmit certain Consent Agreements and proposed Final Orders directly to the EAB. As detailed in this memorandum, I have determined that the Consent Agreement would serve the public interest and would comport with the CAA, applicable regulations, and EPA policy.

Background

EPA's Vehicle and Engine Certification Program

The CAA prohibits any vehicle or engine from being imported and sold in the United States unless it meets applicable federal emission standards. To demonstrate that an imported vehicle or engine meets emission standards, the vehicle or engine must be covered by an EPA-issued certificate of conformity (COC). To obtain a COC, a manufacturer must submit a detailed application to the EPA's Office of Transportation and Air Quality (OTAQ) for each model year of each engine or vehicle family that it intends to manufacture and sell in the United States. The COC application must include, among other things, the identification of the covered engine family, a description of the vehicle or engine including its power, basic parameters, and emission control systems (such as catalysts), as well as a summary of the emission test results demonstrating that the vehicle or engine will meet federal emission standards. Once issued, the COC covers only those vehicles or engines that are produced in the stated model year, imported subsequent to the effective date of the COC, and which conform in all material respects to the design specifications listed in the COC application. If a vehicle or engine does not conform in all material respects to the design specifications listed in the COC application, the vehicle or engine is not covered by that COC.

Respondent

Respondent is a corporation organized under the laws of the State of Texas with an office at 10990 Petal St., Suite 300, Dallas, TX 75238. Respondent holds COCs for, and imports and sells highway motorcycles, recreational vehicles, gasoline engines, and gasoline-powered generators manufactured by, Lifan Industry (Group) Co., Ltd, which is a corporation organized under the laws of the People's Republic of China.

EPA's Inspection

The allegations in the attached CAFO are based on inspections of representative vehicles or engines from each of at least eight separate importations. Inspectors from AED and the United States Department of Homeland Security's Bureau of Customs and Border Protection (CBP) conducted their inspections from 2009 to 2011. The dates and locations of these inspections are detailed in the enclosed CAFO. In addition to inspections, AED issued Respondent a Request for Information under section 208 of the CAA, 42 U.S.C. § 7542, in October 2010 and thereby gathered evidence to support these allegations.

Voided Certificates of Conformity

On October 25, 2013, OTAQ voided 45 COCs issued to Respondent that had purportedly covered 21,233 vehicles in this matter. OTAQ determined that Respondent intentionally or knowingly submitted false, incomplete, or inaccurate information, including fabricated emissions test data and emissions test results. OTAQ also determined that Respondent failed to maintain records required under 40 C.F.R. §§ 86.440-78 and 1051.250.

In correspondence to OTAQ, Respondent blamed a company called System Launch Associates (which Respondent hired to prepare and submit COC applications on its behalf) for the false information and

recordkeeping violations. OTAQ did not refute these claims, but rather explained in its voiding notice that a COC holder faces voiding even when the cause of the voiding was committed by an agent of the COC holder.

In July 2013, the EPA's Office of Criminal Enforcement, Forensics and Training and a United States Attorney's Office successfully indicted Michael G. Johnson, principal of System Launch Associates, on counts of wire fraud. Mr. Johnson allegedly committed this fraud in the course of operating as a consultant who obtained COCs for vehicle manufacturers and importers. In short, the facts show that Mr. Johnson fabricated the emission test results he included in many COC applications, and thereby avoided actually performing the required emission testing. Mr. Johnson entered a plea agreement for these allegations on January 3, 2014, and awaits sentencing. *United States v. Michael Johnson*, No. 3:13-CR-00257-M (N. D. Tex.).

A voided COC is considered to never have been granted. Thus, voiding a COC renders uncertified all vehicles and engines sold, offered for sale, introduced into commerce, delivered for introduction into commerce, or imported under that COC, whether before or after the voiding. 40 C.F.R. § 1068.30.

March 2013 CAFO

On March 13, 2013, AED filed a CAFO with the EAB that addressed all violations in this matter except those claims based solely on OTAQ's voiding of Respondent's COCs. While that CAFO was under consideration, Respondent learned of OTAQ's prospective voiding action, and notified AED that it no longer consented to the terms of that CAFO. By a June 14, 2013 letter, I notified Judge Kathie A. Stein of these developments, and requested that the EAB return the matter to the parties to allow time for OTAQ to complete its voiding action and give the parties a chance to reopen negotiations. By a June 21, 2013 letter, Judge Stein granted this request and returned that CAFO to the parties.

Violations Settled by the Consent Agreement

The alleged violations are detailed in paragraphs 31-39 of the enclosed CAFO. For present purposes, this memorandum provides the following synopsis. The alleged violations fall into twelve categories. Each category involves either recreational vehicles regulated under the CAA and 40 C.F.R. Part 1051, highway motorcycles regulated under the CAA and 40 C.F.R. Part 86, or gasoline engines regulated under the CAA and 40 C.F.R. Part 90.

The first eight categories regard the importation and introduction into United States commerce of vehicles and engines that are not covered by the COC that purportedly covers them for one or more of the following reasons: there is simply no COC that purportedly covers them; they were imported prior to the COC effective date; they are equipped with adjustable parameters not described in the COC application; they are equipped with crankcases that vent directly into the ambient air; their advertised power is greater than that which is described in the COC application; they were manufactured after the COC expired; their model name is not listed on the COC; and they were manufactured by a different company than was listed on the COC.

The ninth category includes warranty violations based on the absence of a mandatory emission-related warranty in the owners manuals for certain recreational vehicles. The tenth category includes labeling

violations concerning labels that could be removed without being destroyed or defaced as is required by CAA regulations. The eleventh category regards various recordkeeping violations. Lastly, the twelfth category includes violations for vehicles based on the fact that OTAQ voided the COCs meant to cover those vehicles.

Civil Penalty

In determining civil penalties, the CAA requires that the EPA consider "the gravity of the violation, the economic benefit or savings (if any) resulting from the violation, the size of the violator's business, the violator's history of compliance with this subchapter, action taken to remedy the violation, the effect of the penalty on the violator's ability to continue in business, and such other matters as justice may require." CAA § 205(c)(2), 42 U.S.C. § 7524(c)(2); *see also* 40 C.F.R. § 1068.125(a)(1), (b)(1) (listing these same factors).

AED uses a penalty policy that incorporates these statutory factors and calculates civil penalties for specific cases. Clean Air Act Mobile Source Civil Penalty Policy – Vehicle and Engine Certification Requirements (Jan. 16, 2009) (Policy), *available at* http://www2.epa.gov/sites/production/files/documents/vehicleengine-penalty-policy_0.pdf

The Policy calculates civil penalties as follows. First, the Policy requires the calculation of the *preliminary deterrence amount*. This is the sum of the *economic benefit* and the *gravity*. The economic benefit is based on the vehicle and engine power; the rule of thumb for calculating the per-vehicle economic benefit is $1 per unit of horsepower, but no less than $15 per vehicle and engine. If a vehicle or engine is stopped upon importation and exported, or if the violation is addressed, for example, through physical modification, then that vehicle or engine is considered *remediated* and there is no economic benefit. Where case-specific information is available to calculate economic benefit, that information is used rather than the rule of thumb. To determine the gravity component, a base gravity figure is calculated according to horsepower, then multiplied to reflect egregiousness (using a factor of 1 for minor violations, 3.25 for moderate violations, or 6.5 for major violations), further increased by 0 – 30% for failure to remediate, scaled down according to the number of vehicles, and adjusted to reflect business size. Second, the Policy requires the calculation of the *initial penalty target figure*. This figure is the preliminary deterrence amount, but with the gravity component adjusted to reflect the violator's degree of willfulness or negligence, degree of cooperation or non-cooperation, and history of noncompliance. Finally, the initial penalty target figure can be adjusted to account for unique factors, and such adjustments yield the *adjusted penalty target figure*.

Under the Consent Agreement, Respondents will pay a civil penalty of $630,000 (plus interest) within 300 days of entry of the Final Order. This civil penalty comports with the CAA statutory guidelines and the Penalty Policy. This penalty was calculated as follows.

The preliminary deterrence amount here is $1,444,358. The first component of this preliminary deterrence amount, the economic benefit, is $93,776. This amount is based on the Penalty Policy's rule of thumb. Again, this is the sum of $1 per unit for horsepower for each vehicle and engine (but no less than $15 per vehicle or engine) that was not remediated. Here, the vehicles' and engines' power ranged between 2.41 horsepower and 16.09 horsepower. See Table A, below, for exact horsepower ratings for each engine family. As explained in the following paragraph, this rule of thumb calculation applies only

to the approximately 6,776 vehicles and engines for which AED alleges violations *besides* allegations based on the OTAQ's COC voiding. Further, of these 6,776 vehicles and engines, approximately 528 were detained by CBP at the point of importation then remediated by either correcting the compliance problem or, more commonly, by denying their entry to United States markets. So, these approximately 528 vehicles and engines generated no economic benefit for Respondent. See Table A, below, to identify which vehicles and engines were remediated.

The rule of thumb economic benefit calculation does not apply to the approximately 21,223 vehicles and engines for which the sole alleged violation is based on the fact that OTAQ voided the COC that purportedly covered them. The Penalty Policy states that this rule of thumb is inappropriate where the respondent "identifies economic benefit factors that are unique to the case [or where] the case development team has reason to believe it will produce a substantially inaccurate result." Penalty Policy at 10. Here, the United States Attorney's Office for the Northern District of Texas indicted Michael G. Johnson on various counts of wire fraud, and a plea agreement was entered on January 3, 2014. These charges are based on an alleged scheme in which Mr. Johnson took payment from Respondent and other clients in exchange for what he represented were legitimate services, including vehicle exhaust testing, to obtain COCs for Respondent and other clients. Respondents have argued that they received no economic benefit with respect to the approximately 21,223 vehicles in this case whose sole alleged violation is based on OTAQ's voiding because that voiding was based on Mr. Johnson's scheme to defraud Respondent.

Next, the gravity portion of this preliminary deterrence amount is the sum of two parts. The first part is $980,592, which is a gravity-based penalty for all the violations except the recordkeeping violations. This amount was calculated using a straightforward application of the EPA's Penalty Policy based on vehicle and engine horsepower, number of vehicles and engines, and an egregiousness factor of "major" for each vehicle and engine (all vehicles had at least one "major" certification violation). For the reasons set forth in the Penalty Policy (p. 15), the base per-vehicle gravity figure was scaled for engine horsepower per Table 1 of the Penalty Policy (p. 16). Similarly, the gravity figure as scaled for horsepower and adjusted for egregiousness was then scaled to account for the total number of vehicles per Table 3 of the Penalty Policy (p.18). This first part of the gravity also includes a 30% increase for the approximately 6,248 vehicles and engines for which AED alleges violations unrelated to OTAQ's voiding and that were not remediated to reflect Respondents' failure to remediate. The Penalty Policy states "The litigation team has discretion to specify the percentage, up to 30 percent, by which the gravity is increased where remedial action is not taken." Penalty Policy at 14. The penalty includes no additional gravity-based penalty for failure to remediate the approximately 528 vehicles and engines that were, in fact, remediated. The penalty likewise includes no additional gravity-based penalty for failure to remediate the approximately 21,223 vehicles and engines in this case whose sole alleged violation is based on OTAQ's voiding.[1] See Table A, below, for a detailed summary of this calculation.

[1] This is appropriate because these violations accrued with OTAQ's voiding action in late 2013, long after these vehicles were sold and, in many cases, long after the useful life of these vehicles. Of the types of remediation discussed in the Penalty Policy, only "recall and repair" could apply here, because neither the Respondent nor the United States possess the vehicles. Even if a recall could occur, there are no physical attributes that could be repaired that would render the vehicles compliant or near compliant; their violation is that their COC was voided and this violation cannot be cured by physical modification.

Table A - Summary of Preliminary Deterrence Amount for All Violations Except Recordkeeping									
Purported Engine Family	Total Quantity Vehicles and Engines	Quantity Claims Beside Voiding	Quantity Remed-iated	Horse-power	Base Gravity	Economic Benefit	Gravity Scaled	Gravity for Failure to Correct	Total Gravity
7LFNX0.25NFG	108	42		16.08	$ 5,990	$ 675	$ 169,648	$ 19,792	$ 189,440
8LFNX0.25NFG	600			16.09	$ 5,992	$ 0	$ 143,801	$ -	$ 143,801
9LFNX0.25NFG	600			16.09	$ 5,992	$ 0	$ 84,747	$ -	$ 84,747
ALFNX0.25NFG	600			16.09	$ 5,992	$ 0	$ 28,760	$ -	$ 28,760
BLFNC0.20NFG	700			15.42	$ 5,905	$ 0	$ 33,066	$ -	$ 33,066
ALFNC0.20NFG	1,600			15.42	$ 5,905	$ 0	$ 75,579	$ -	$ 75,579
ALFNC0.25NFG	350			14.75	$ 5,818	$ 0	$ 16,289	$ -	$ 16,289
6LFNC0.25NFG	800			14.75	$ 5,818	$ 0	$ 37,232	$ -	$ 37,232
8LFNC0.25NFG	128			14.75	$ 5,818	$ 0	$ 5,957	$ -	$ 5,957
BLFNC0.25NFG	1,000			14.75	$ 5,818	$ 0	$ 46,540	$ -	$ 46,540
7LFNC0.25NFG	346	48		14.74	$ 5,816	$ 720	$ 16,099	$ 670	$ 16,769
9LFNC0.25NFG	379	128		14.74	$ 5,816	$ 1,920	$ 17,635	$ 1,787	$ 19,421
9CLGS.42090F	204	204	204	10.988	$ 5,714	$ 0	$ 9,325	$ -	$ 9,325
unknown engines	15	15	15	10.988	$ 5,714	$ 0	$ 686	$ -	$ 686
7LFNC0.15NFG	200			13.4	$ 5,642	$ 0	$ 9,027	$ -	$ 9,027
8LFNC0.15NFG	200			13.4	$ 5,642	$ 0	$ 9,027	$ -	$ 9,027
9LFNC0.15NFG	200			13.4	$ 5,642	$ 0	$ 9,027	$ -	$ 9,027
ALFNC0.15NFG	200			13.4	$ 5,642	$ 0	$ 9,027	$ -	$ 9,027
7LFNC0.20NFG	1,362			12.06	$ 5,468	$ 0	$ 59,577	$ -	$ 59,577
9LFNC0.20NFG	742	742	132	12.06	$ 5,468	$ 9,150	$ 32,457	$ 8,005	$ 40,462
6LFNC0.20NFG	1	1		12.06	$ 5,468	$ 15	$ 44	$ 13	$ 57
8LFNC0.20NFG	799	799		12.06	$ 5,468	$ 11,985	$ 34,950	$ 10,485	$ 45,435
7LFNX0.12NFG	63			8.04	$ 4,181	$ 0	$ 2,107	$ -	$ 2,107
8LFNX0.12NFG	252	252		8.04	$ 4,181	$ 3,780	$ 8,428	$ 2,529	$ 10,957
6LFNC0.12NFG	1,500			8.04	$ 4,181	$ 0	$ 12,817	$ -	$ 12,817
9LFNX0.12NFG	750			8.04	$ 4,181	$ 0	$ 5,017	$ -	$ 5,017
ALFNC0.12NFG	1,400			8.04	$ 4,181	$ 0	$ 9,365	$ -	$ 9,365
ALFNX0.12NFG	1,100			8.04	$ 4,181	$ 0	$ 7,358	$ -	$ 7,358
7LFNC0.12NFG	876	600		6.7	$ 3,484	$ 9,000	$ 4,883	$ 1,003	$ 5,887
8LFNC0.12NFG	136	136		6.7	$ 3,484	$ 2,040	$ 758	$ 227	$ 986
9LFNC0.12NFG	544	408		6.7	$ 3,484	$ 6,120	$ 3,032	$ 682	$ 3,715
9LFNX0.07NFG	369	369	19	6.03	$ 3,136	$ 5,250	$ 1,851	$ 527	$ 2,378
7LFNX0.07NFG	560	172		6.03	$ 3,136	$ 2,580	$ 2,809	$ 259	$ 3,068
8LFNX0.07NFG	123	123		6.03	$ 3,136	$ 1,845	$ 617	$ 185	$ 802
ALFNX0.07NFG	600			6.03	$ 3,136	$ 0	$ 3,010	$ -	$ 3,010
9CLGS.19668F	152	152	152	5.36	$ 2,787	$ 0	$ 678	$ -	$ 678
7LFNX0.05NFG	80	80		4.556	$ 2,369	$ 1,200	$ 303	$ 91	$ 394
7LFNX0.05JNK	72			4.556	$ 2,369	$ 0	$ 273	$ -	$ 273
9LFNX0.05JNK	213	213		4.556	$ 2,369	$ 3,195	$ 807	$ 242	$ 1,050
8LFNX0.05JNK	1,000	-		4.55	$ 2,366	$ 0	$ 3,786	$ -	$ 3,786
ALFNX0.05JNK	1,000			4.55	$ 2,366	$ 0	$ 3,786	$ -	$ 3,786
BLFNC.04926A	72	72		4.154	$ 2,160	$ 1,080	$ 249	$ 75	$ 323
9LFNX0.05NFG	123	123	6	2.68	$ 1,394	$ 1,755	$ 274	$ 78	$ 353
8LFNX0.05NFG	123	123		2.68	$ 1,394	$ 1,845	$ 274	$ 82	$ 357
ALFNX0.05NFG	600			2.68	$ 1,394	$ 0	$ 1,338	$ -	$ 1,338
9LFNC0.05NFG	1,196	1,000		2.412	$ 1,254	$ 15,000	$ 2,400	$ 602	$ 3,002
8LFNC0.05NFG	898	898		2.412	$ 1,254	$ 13,470	$ 1,802	$ 541	$ 2,343
7LFNC0.05NFG	1,393	76		2.412	$ 1,254	$ 1,140	$ 2,795	$ 46	$ 2,841
6LFNC0.05NFG	800			2.412	$ 1,254	$ 0	$ 1,605	$ -	$ 1,605
ALFNC0.05NFG	870			2.412	$ 1,254	$ 0	$ 1,746	$ -	$ 1,746
	27,999	**6,776**	**528**			**$ 93,766**	**$ 932,671**	**$ 47,921**	**$ 980,592**

The second part of the gravity portion of the preliminary deterrence amount is the gravity for the recordkeeping violations. This amount is $370,000. The Penalty Policy does not provide a method to calculate civil penalties for recordkeeping violations, so this penalty was calculated as follows. Note, AED has applied this method in numerous cases. For each record Respondent failed to keep (or category of records, as appropriate), AED assessed a $5,000 penalty. This amount was determined based on AED's review of the extent of the missing information, the disorganization of the information, the number of vehicles involved, the risk of unlawful emissions from those vehicles, and importance of the missing information to understanding vehicle emissions, assessing compliance, and facilitating recalls and other remediation. Violations were counted and penalties were assessed for each separate engine family for which there are recordkeeping violations. This amount is reasonable, especially in light of the CAA's authorization of $37,500 per day per violation. CAA §§ 203(a)(2)(A), 205(a), 208(a), 42 U.S.C. §§ 7522(a)(2)(A), 7524(a), 7542(a); 40 C.F.R. §§ 19.4, 1068.101(a)(2). Here, Respondent failed to keep and maintain the emission test records required by 40 C.F.R. §§ 86.440-78(a)(2)(B) (motorcycles) or 40 C.F.R. § 1051.250(b)(2) (recreational vehicles) for 15 engine families. This is 15 violations at $5,000 each, or $75,000. Next, Respondent failed to keep and maintain the history of each emission data vehicle required by 40 C.F.R. §§ 86.440-78(a)(2)(A) (motorcycles) or 40 C.F.R. § 1051.250(b)(3) (recreational vehicles) for 15 engine families. This is an additional 15 violations at $5,000 each, or $75,000. Lastly, Respondent failed to provide to EPA owner's manuals for 44 engine families. Owner's manuals provide consumers, mechanics, and the EPA with critical information about the vehicle maintenance, warranty, and emission-related specifications. In the case of recreational vehicles, the regulations require a compliant warranty statement in the owner's manuals. For these reasons, it is appropriate to assess an additional $5,000 penalty for each missing owner's manual, or $220,000 total. The foregoing sums to a total of a gravity-based penalty of $370,000 for Respondent's recordkeeping violations.

As detailed above, the preliminary deterrence amount here is $1,444,358, which is the sum of a $93,766 economic benefit component, a $980,592 gravity component for non-recordkeeping violations, and a $370,000 gravity component for recordkeeping violations.

Next, the initial penalty target figure is the preliminary deterrence amount, but with the gravity component adjusted to reflect the violator's degree of willfulness or negligence, degree of cooperation or non-cooperation, and history of noncompliance. Here, AED reduced the gravity component of the preliminary deterrence amount by 10% to reflect Respondent's cooperation; this was demonstrated throughout negotiations, including their willingness to toll the statute of limitations pending OTAQ's voiding actions and negotiations. AED also reduced the gravity component of the preliminary deterrence amount by an additional 2% to reflect Respondent's degree of willfulness or negligence; this is based on Respondent's relative lack of control over the events constituting the violation (namely the manufacturing errors that occurred overseas). Penalty Policy at 24. This reduction yields a $1,282,287 initial penalty target figure.

Finally, unique factors of this case warrant a substantial reduction to the initial penalty target figure. AED has determined that there are unique circumstances related to the alleged recordkeeping violations and alleged violations based on the voided COCs. Respondent claims that it is a victim of a fraud perpetrated by Michael G. Johnson and his company, System Launch Associates. There is substantial evidence to support this claim. The CAA requires the EPA to evaluate "other matters as justice may require" when determining a potential civil penalty. OCE acknowledges substantial litigation risk with respect to an action for civil penalties under these circumstances. Thus, the AED Director accounted for the inherent litigation risk relating to these claims as well as the special factors in this case by applying

an approximately 70% reduction to the gravity component of the penalty for the 21,233 vehicles for which the alleged violation arises solely out of the pending voiding action.[2] Similarly, the AED Director applied a 70% reduction to a $150,000 portion of the recordkeeping penalty; this is the portion attributable to Respondent's failure to keep and maintain emission test records and records of the history of each emission data vehicle. This reduction is warranted because these records were allegedly withheld from Respondents by Mr. Johnson. The total reduction described above is $652,287.

This reduction yields an adjusted penalty target figure of $630,000 to which the parties have agreed in paragraph 40 of the attached CAFO. In sum, AED calculated the penalty for the certification, warranty, and label violations by application of the Penalty Policy, and for the recordkeeping violations by application of a case-specific method.

Non-Penalty Conditions of Settlement

In addition to the civil penalty, the parties have agreed to a non-penalty condition of settlement. As detailed in paragraph 47 and Appendix B of the attached CAFO, Respondent has committed to obtain a bond under which a United States bank acts as a surety to satisfy any civil penalties from any future CAA enforcement case concerning model year 2014–2016 recreational vehicles or motor vehicles manufactured by Respondent or its affiliated vehicle manufacturers. This bond is a kind of financial assurance that is modeled on a similar bond requirement currently required of all gasoline engine manufacturers by 40 C.F.R. § 1054.690. If Respondent fails to satisfactorily post this bond, Respondent has agreed to pay stipulated penalties in the amount of $5,000 per day until the time that Respondent satisfactorily posts this bond.

Release and Covenant Not-to-Sue

As specified in the Consent Agreement, payment of the civil penalty will resolve Respondent's civil penalty liability related to the alleged violations. Additionally, as a term of the CAFO, the EPA is granting Respondent a covenant not-to-sue for any injunctive or other equitable relief related to the alleged violations as well as the potential voiding action. If Respondent fails to timely satisfy the non-penalty condition in paragraph 47 and Appendix B of the attached CAFO (satisfactorily post the bond and timely pay any stipulated penalties owed), the covenant terminates. Otherwise, the covenant becomes permanent upon Respondent's completion of this non-penalty condition of settlement. This is reflected in the proposed Final Order.

Environmental Appeals Board Jurisdiction

The Environmental Appeals Board is authorized to ratify consent orders memorializing settlements between the EPA and Respondents resulting from administrative enforcement actions under the CAA, and to issue final orders assessing penalties under the CAA. *See* EPA Delegation 7-41-C; 40 C.F.R. § 22.4(a)(1). Thus, by ratifying the Consent Agreement and issuing the Final Order, the EAB would be memorializing the settlement between the EPA and Respondent and would be ordering Respondent to pay the proposed civil penalty. As the language of the Consent Agreement makes clear, if Respondent fails to comply with the non-penalty terms of the CAFO, EPA's covenant not-to-sue terminates, and the

[2] Note OCE has not eliminated the entire penalty for the violations related to the voiding action because Respondent is strictly liable for these violations under the CAA.

EPA may pursue injunctive and other equitable relief against Respondent related to the alleged violations.

Human Health and Environmental Concerns Presented by Respondents' Actions

The CAA aims to reduce emissions from mobile sources of air pollution, including carbon monoxide, oxides of nitrogen, and hydrocarbons (subject pollutants). *Mobile sources* is a term used to describe a wide variety of vehicles, engines, and equipment that generate air pollution and that move, or can be moved, from place to place. Mobile sources of air pollution contribute approximately 73% of the nation's carbon monoxide emissions and 58% of the nation's oxides of nitrogen emissions.

The subject pollutants pose significant health and environmental concerns. First, carbon monoxide is a poisonous gas that forms when carbon in fuel does not burn completely. Carbon monoxide is harmful because it reduces oxygen delivery to the body's organs and tissues. It is most harmful to those who suffer from heart and respiratory disease. High carbon monoxide pollution levels also affect healthy people. Symptoms may include visual impairment, headache, and reduced work capacity. Second, oxides of nitrogen form when fuel burns at high temperatures. Oxides of nitrogen can travel long distances, causing a variety of health and environmental problems in locations far from their emissions source. These problems include ozone and smog. Oxides of nitrogen also contribute to the formation of particulate matter through chemical reactions in the atmosphere, and particulate matter can cause asthma, difficult or painful breathing, and chronic bronchitis, especially in children and the elderly. Finally, hydrocarbon emissions result from incomplete fuel combustion and fuel evaporation. Hydrocarbons are a precursor to ground-level ozone, a serious air pollutant in cities across the United States. Ground-level ozone, a key component of smog, is formed by reactions involving hydrocarbons and oxides of nitrogen in the presence of sunlight. Ground-level ozone causes health problems such as difficulty breathing, lung damage, and reduced cardiovascular functioning. A number of hydrocarbons are also considered toxic, meaning they can cause cancer or other health problems.

EPA has no emission test data for the vehicles and engines in this case, and the test data provided in many of the COC applications is unreliable. Therefore, the exact emissions consequences stemming from these violations are unclear.

The CAFO Would Serve the Public Interest

This CAFO serves the public interest by promoting compliance with the EPA's vehicle certification program. When companies manufacture and sell vehicles that materially differ from their certified configuration, these companies gain an unfair advantage over their competitors who are complying with the law. This CAFO removes Respondents' economic benefit of noncompliance, thereby remedying the unfair economic advantage gained over competitors. The gravity component of the penalty will also specifically deter Respondents, and generally deter others in the industry, from committing similar violations in the future.

EPA Delegations of Authority and Administrative Penalty Waiver

Phillip A. Brooks, Director of AED, is authorized to sign the CAFO on the EPA's behalf. Congress delegated to the EPA Administrator the authority to administratively assess civil penalties in lieu of a civil judicial action in matters involving penalties under $320,000 "unless the Administrator and the

Attorney General jointly determine that a matter involving a larger penalty amount is appropriate for administrative penalty assessment." CAA § 205(c)(1), 42 U.S.C. § 7524(c)(1); 40 C.F.R. §§ 19.4, 90.1006(c)(1), 1068.125(b); Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66,643 (November 6, 2013) (to be codified at 40 C.F.R. § 19.4); *see* 40 C.F.R. § 90.1006(a)(6) (defining a violation of 40 C.F.R. § 90.1003(a) as being a violation of sections 203 and 213(d) of the CAA, 42 U.S.C. §§ 7522 and 7547(d), for which the administrative penalty cap has been adjusted for inflation). Here, the United States Department of Justice (DOJ) concurred with the EPA determination that this matter should proceed administratively. DOJ's concurrence is memorialized in two letters from W. Benjamin Fisherow, Section Chief of the Environmental Enforcement Section, Environment and Natural Resources Division. These letters are enclosed here.

The Administrator delegated the authority "to sign consent agreements memorializing settlements between the Agency and respondents" and to "represent the EPA in administrative proceedings conducted under the CAA and to negotiate consent agreements between the Agency and respondents resulting from such enforcement actions" to the Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA AA). EPA Delegation 7-6-A; Delegation 7-6-B. The OECA AA redelegated these authorities to the Division Director level. Office of Enforcement and Compliance Assurance Redelegation 7-6-A (March 5, 2013); Office of Civil Enforcement Redelegation 7-6-A (March 5, 2013). Thus, Phillip A. Brooks, Director of the AED, is authorized to sign a CAFO on the EPA's behalf.

Recommendation

I respectfully recommend that you ratify the Consent Agreement and issue the proposed Final Order. Please direct any questions to Phillip A. Brooks at (202) 564-0652 or Evan M. Belser at (202) 564-6850.

Enclosures: Consent Agreement and Proposed Final Order
DOJ Concurrence with EPA's Decision to Proceed Administratively (May 21, 2012)
DOJ Supplemental Concurrence (Aug. 13, 2013)

cc: Tony Sun, Representative for Respondent